(2)

Supreme Court, U.S.
FILED
APR 8 2002
OFFICE OF THE CLERK

No. 01-954

In the Supreme Court of the United States

WILEY GENE WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

MICHAEL CHERTOFF
Assistant Attorney General

LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

218

QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that petitioner had not demonstrated that the circumstances surrounding his indictment justified a finding that the prosecution had been motivated by vindictive animus.

2. Whether the court of appeals correctly held that a district court's determination of whether a presumption of vindictiveness arises is properly reviewed de novo.

3. Whether petitioner can challenge dictum in the court of appeals' opinion concerning the standard of review of discovery orders on vindictive prosecution claims, where the court of appeals did not reach the question whether the district court's discovery orders were proper.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Berger v. *United States*, 295 U.S. 78 (1935)	13
Blackedge v. *Perry*, 417 U.S. 21 (1974)	6, 14
Brady v. *Maryland*, 373 U.S. 83 (1963)	13
Giglio v. *United States*, 405 U.S. 150 (1972)	13
S&E Contrators, Inc. v. *United States*, 406 U.S. 1 (1972)	13
Thigpen v. *Roberts*, 468 U.S. 27 (1984)	13
United States v. *Adams*, 870 F.3d 1140 (6th Cir. 1989)	11
United States v. *Armstrong*, 517 U.S. 456 (1996)	6, 12
United States v. *Goodwin*, 457 U.S. 368 (1982)	7, 14
United States v. *Koh*, 199 F.3d 632 (2d Cir. 1999), cert. denied, 530 U.S. 1222 (2000)	10
United States v. *Meyer*, 810 F.2d 1242 (D.C. Cir. 1987), cert. denied, 485 U.S. 940 (1988)	14
United States v. *Monsoor*, 77 F.3d 1031 (7th Cir. 1996)	11
United States v. *Perez*, 79 F.3d 79 (7th Cir.), cert. denied, 519 U.S. 856 (1996)	14
United States v. *P.H.E., Inc.*, 965 F.2d 848 (10th Cir. 1992)	12
United States v. *Schoolcraft*, 879 F.2d 64 (3d Cir.), cert. denied, 493 U.S. 995 (1989)	11

Cases—Continued: Page

United States v. *Wall*, 37 F.3d 1443 (10th Cir. 19994) 15

United States v. *Woods*, 36 F.3d 945 (10th Cir. 1994) 15

Constitution and statutes:

U.S. Const.:

Amend. I 12

18 U.S.C. 751(a) 2

18 U.S.C. 922(g) 2

In the Supreme Court of the United States

No. 01-954

WILEY GENE WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-33) is reported at 262 F.3d 305. The oral ruling of the district court (Pet. App. 34-38) dismissing petitioner's indictment is unreported. The order of the district court denying the government's motion for reconsideration of the dismissal order (Pet. App. 39-52) is reported at 120 F. Supp. 2d 550.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2001. A petition for rehearing was denied on September 12, 2001. Pet. App. 53-54. The petition for a writ of certiorari was filed on December 11, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On April 18, 2000, petitioner was indicted in the United States District Court for the Eastern District of North Carolina on one count of escaping from custody, in violation of 18 U.S.C. 751(a). Pet. App. 7. The district court dismissed the indictment, finding that the prosecution had been motivated by "vindictive animus." *Id.* at 34-38. The court of appeals reversed and ordered that the indictment be reinstated. *Id.* at 1-33.

1. In 1998, petitioner was convicted in the District of South Carolina of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g). Gov't C.A. Br. 8. Petitioner was sentenced to 210 months' imprisonment, and was returned to the federal prison in Butner, North Carolina, where he already was serving a sentence for a 1983 kidnapping conviction. Pet. App. 3-4.

Shortly after his firearms conviction, petitioner was turned over, pursuant to the Interstate Agreement on Detainers Act, to Nevada authorities so that he could face state theft charges there. Pet. App. 4. Before the transfer, petitioner signed an agreement acknowledging that he was being temporarily transferred to state custody, that he was not to be released into the community, and that he was required to call the Bureau of Prisons immediately if he was released or transferred somewhere other than to federal custody. *Ibid.*

In December 1998, Nevada authorities inadvertently released petitioner after his state charges were resolved. Pet. App. 4. Petitioner did not contact the Bureau of Prisons; instead, he fled to California. *Ibid.* In January 1999, he was apprehended and returned to federal custody in Butner. *Id.* at 4-5.

After petitioner was re-incarcerated, a Deputy United States Marshal in the Eastern District of North Carolina opened a file and recommended that petitioner be prosecuted for escape. Pet. App. 5. The Marshal forwarded his recommendation to authorities in Nevada, who declined to prosecute because they did not think that venue was proper in Nevada. *Ibid.*

During the same period, a Deputy United States Marshal from the District of South Carolina who had been involved in petitioner's firearms trial asked federal authorities in North Carolina whether petitioner would be prosecuted for escape. Pet. App. 5. The South Carolina Marshal continued to make inquiries of the North Carolina authorities even after he was told that the matter had been referred to Nevada. *Ibid.* On January 25, 2000, the South Carolina Marshal prepared a memorandum in which he recommended that the North Carolina authorities prosecute petitioner for escape. *Ibid.* The memo stated that petitioner had "threatened the original sentencing judge [in the firearms possession case] and had filed numerous actions against jailers and [United States Marshal Service] personnel." *Id.* at 5-6. The South Carolina Marshal sent this memo to a different North Carolina marshal than the one who had originally opened the file on petitioner. *Id.* at 5.

In March 2000, petitioner's firearms conviction was vacated on appeal. Pet. App. 6. The next day, the South Carolina Marshal's January 25 memo was faxed to the United States Attorney for the District of South Carolina. *Ibid.* Several days later, the United States Attorney for South Carolina sent an e-mail message to the United States Attorney for the Eastern District of North Carolina, requesting that the latter office prosecute petitioner for escape. *Ibid.* The message stated

that the North Carolina marshal's office was "particularly interested in having [petitioner] prosecuted because of his threats against the sentencing Judge and other aggravating factors," and stressed that the South Carolina authorities wanted petitioner prosecuted "not because" his firearms conviction had been reversed "but because we consider [petitioner] dangerous." *Id.* at 6 n.1. The message also erroneously indicated that petitioner's release from federal custody might be "imminent." *Id.* at 7.

On April 18, 2000, more than a month later and after a prosecutorial memorandum had been prepared by North Carolina authorities, a grand jury sitting in the Eastern District of North Carolina returned an indictment charging petitioner with escape. Pet. App. 7. On May 17, 2000, the grand jury returned a superseding indictment that made corrections to the original indictment. *Ibid.*

2. Petitioner filed a motion to dismiss the indictment, arguing that the prosecution for escape had been initiated to retaliate against him for his success in appealing his firearms conviction. Pet. App. 7-8. Petitioner argued that, based on the facts, the court should either "presume vindictiveness" and dismiss the indictment or order discovery. *Id.* at 8. The district court initially concluded that petitioner had not made a sufficient showing to trigger a presumption of vindictiveness, but determined that he was entitled to discovery on his claim. *Id.* at 9. The government objected to the discovery order and sought a protective order. *Ibid.* Pending a decision on its request for a protective order, the government declined to provide any confidential information to petitioner. *Ibid.*

On August 14, 2000, rather than resolving the discovery dispute, the district court held a hearing on the

merits and found in favor of petitioner. Pet. App. 9. After the hearing, the court found that petitioner had established that the prosecution "was vindictive" and ordered that the indictment be dismissed. *Id.* at 10-11.

The government filed a motion for reconsideration. Pet. App. 11. The North Carolina prosecutors stated that they had a policy of prosecuting all escapes, and informed the court that they had determined, after an independent review of the file, that they could make out an escape case against petitioner and that he posed a danger to the community. *Id.* at 12. The government also noted that federal authorities in South Carolina had begun their efforts to have petitioner prosecuted for escape more than a year before his firearms conviction was reversed. *Ibid.*

The district court denied the motion for reconsideration, holding that the government had not "provide[d] the independent reasons necessary to thwart the presumption of vindictiveness raised by [petitioner]." Pet. App. 12-13. The court concluded that "no one had shown any interest" in prosecuting petitioner for escape for over a year after petitioner had erroneously been released in Nevada; that the threat to the sentencing judge was not "serious"; and that the United States Attorney for South Carolina had "prevailed upon" his counterpart in the Eastern District of North Carolina to bring the instant prosecution. *Id.* at 13-14.

3. The court of appeals reversed. Pet. App. 1-33. The court found it "well established that a prosecutor violates the Due Process Clause * * * by exacting a price for a defendant's exercise of a clearly established right," such as the right to appeal. *Id.* at 15-16. It noted that, to make out a claim of vindictive prosecution, a defendant must demonstrate "that (1) the prosecutor acted with genuine animus toward the defen-

dant and (2) the defendant would not have been prosecuted but for that animus." *Id.* at 16. In addition, the court recognized that a defendant who cannot directly prove vindictiveness may be entitled to a presumption in his favor if he can "show that the circumstances 'pose a realistic likelihood of vindictiveness.'" *Id.* at 16-17 (quoting *Blackledge* v. *Perry*, 417 U.S. 21, 27 (1974)). The court also noted that a defendant who claims vindictive prosecution is not even entitled to discovery unless he produces "objective evidence tending to show the existence of prosecutorial misconduct." *Id.* at 19.

The court of appeals first concluded that the district court had clearly erred in finding that petitioner had demonstrated that the government had acted with actual vindictiveness in deciding to prosecute him for escape. Pet. App. 20-23. The court relied on the numerous "undisputed facts that buttress the presumption of 'regularity'" to which prosecutorial decisions are always entitled. *Id.* at 20 (quoting *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996)). It noted that: (1) the government possessed evidence that petitioner had knowingly failed to report to Bureau of Prisons authorities after his mistaken release by Nevada authorities; (2) a grand jury had found that there was probable cause to charge petitioner with escape; (3) "the facts giving rise to the escape prosecution were unrelated to the facts giving rise to the firearm-possession case and therefore merited at least one initial review for prosecution"; (4) "the prosecutor for the firearm-possession case was different from the prosecutor who had jurisdiction over the escape prosecution"; (5) "efforts to initiate the escape prosecution began immediately after the escape and long after the firearm possession conviction was vacated, and no decision was ever made not to prosecute the escape"; and

(6) the North Carolina authorities "had a policy of prosecuting all escapes." *Id.* at 20-21. The court of appeals also determined that petitioner had "no evidence" that anyone in the North Carolina United States Attorneys' office had "acted with any purpose of punishing [petitioner's] victory in the firearm-possession case or of vindicating any personal interest of the U.S. Attorney in South Carolina to punish [petitioner] for exercising his right to appeal the South Carolina [firearms] conviction." *Id.* at 22.

The court of appeals also determined that petitioner had not presented facts sufficient to justify a presumption of vindictiveness. Pet. App. 23-29. Because the relevant question was whether the objective circumstances demonstrated a "realistic likelihood of vindictiveness," the court determined that the proper standard of review was de novo. *Id.* at 19, 24.

The court stressed that "both of the[] prerequisites" that this Court has found necessary to justify a presumption of vindictiveness were absent, because the escape charge had never been the subject of a prior prosecution and because the prosecutor of the escape charge was not involved in petitioner's prosecution for firearms possession and thus had no "personal stake" in the outcome of that trial. Pet. App. 26. Moreover, even assuming that the decision to charge appellant with escape was made after he had succeeded in having his firearms possession conviction overturned, the court of appeals considered it "likely that the decision was based on the fear that [petitioner] would pose a threat to public safety." *Id.* at 27.

The court of appeals also gave two other reasons for its conclusion that petitioner was not entitled to rely on a presumption of vindictiveness. Citing *United States* v. *Goodwin*, 457 U.S. 368 (1982), it noted that an in-

creased charge after a previous trial is more likely to be improperly motivated than is a pretrial decision. Pet. App. 27. The court pointed out that "[b]ecause the facts giving rise to the escape charge occurred after the conviction on the firearm-possession charge, this case bears a strong similarity to *Goodwin*, where the decision to add additional charges to an indictment was made before trial but after the defendant failed to plead as expected." *Ibid.*

Finally, the court of appeals pointed out that "the prosecutor charged with vindictiveness in this case was different—indeed, she is in a different office—from the prosecutor who brought the charge that [petitioner] successfully appealed." Pet. App. 28. The court stated that, even if petitioner had shown the actions of the prosecutors in South Carolina were subject to a presumption of vindictiveness, it "could not, on this record, impute the improper motivation" to the prosecutors in North Carolina. *Ibid.* The court explained that such imputation was "especially" unwarranted because "the circumstances fail to suggest that the North Carolina U.S. Attorney was aware that the referring office might have been motivated by a vindictive animus when it requested that [petitioner] be indicted for escape" and because the only information that the referring office passed on was that petitioner might soon be released and, therefore, would pose a danger to the community. *Id.* at 29.

The court of appeals ordered that the indictment be reinstated and remanded for further proceedings. Pet. App. 32-33. The court did not, however, "reach the

government's challenge to the district court's ruling ordering discovery." *Id.* at 29.[1]

ARGUMENT

1. Petitioner contends (Pet. 5-8) that, in rejecting his vindictive prosection claim, the court of appeals held that the motivation of the South Carolina federal prosecutors who referred his escape prosecution to North Carolina federal prosecutions was "irrelevant" because the North Carolina prosecutors were not aware of that motive, and that that analysis "places the Fourth Circuit in direct conflict with decisions of other circuits." Pet. 5. That contention lacks merit.

The court of appeals did not adopt the broad holding that petitioner attributes to it. In concluding that petitioner had not proved that the prosecution was animated by an actual vindictive motive, the court of appeals rejected both halves of petitioner's submission: that "the South Carolina U.S. Attorney held a vindictive animus based on [petitioner's] successful appeal of his firearm-possession conviction" and "that this animus was somehow transferred to the U.S. Attorney for the Eastern District of North Carolina through the March 14 e-mail." Pet. App. 21. In addition to observing that many factors supported an independent decision by the North Carolina prosecutors to prosecute petitioner for escape apart from the March 14 e-mail, the court of appeals also underscored that "the person who persisted in returning the prosecution to North Carolina was Deputy Marshal Batey from the District of South Carolina. But the beginning of his efforts to prosecute [petitioner] in North Carolina pre-

[1] The court of appeals also affirmed a ruling by the district court that venue was proper in the Eastern District of North Carolina. Petitioner does not renew his venue challenge here.

ceded [petitioner's] success in the appeal of his firearm-possession case." *Id.* at 21-22. Moreover, the court further explained that the acceleration of the escape prosecution following the Fourth Circuit's reversal in the firearms case "was attributable to the prosecutors' interest in not having [petitioner] returned to the street in view of his perceived dangerousness." *Id.* at 22. Those findings contradict petitioner's claim that the court of appeals found the motives of the South Carolina prosecutors to be "irrelevant" (Pet. 5), and instead show that it held that petitioner "has not carried [his] heavy burden" to show a vindictive motive *by any prosecutor* for his prosecution. Pet. App. 22.[2]

The actual holding of the court of appeals does not conflict with the decisions of any other court of appeals. Petitioner correctly notes (Pet. 5) that *United States* v. *Koh*, 199 F.3d 632 (2d Cir. 1999), cert. denied, 530 U.S. 1222 (2000), stated that a defendant can make out a vindictive prosecution claim by showing that the prosecutor "was prevailed upon to bring the charges by another with animus such that the prosecutor could be considered a 'stalking horse.'" *Id.* at 640 (quotation marks and citation omitted). *Koh* does not support petitioner, however. In that case, the defendant argued that a court-appointed receiver had improperly influenced a United States Attorney's decision to prosecute him. *Ibid.* The court of appeals rejected that claim, noting that "the presumption of prosecutorial vindic-

---

[2] In fact, the United States Attorney for South Carolina expressly disavowed any improper motivation in his e-mail request to his counterpart in North Carolina. See Pet. App. 6 n.1 ("This district seeks [petitioner's] escape prosecution, not because of the Fourth Circuit's decision [overturning the firearms conviction], but because we consider [petitioner] dangerous—thus, the DUSM made his request long before the recent appellate court decision.").

tiveness generally does not arise in the pretrial setting," *id.* at 639, and it declined to apply such a presumption in *Koh*, *id.* at 640. The court then went on to hold that Koh had failed to show that the government's decision to prosecute was the result of the allegedly improper motives of the receiver. *Ibid.*

Nor do the other cases cited by petitioner demonstrate the existence of a conflict in the circuits. In *United States* v. *Schoolcraft*, 879 F.2d 64 (3d Cir.) (Pet. 6), cert. denied, 493 U.S. 995 (1989), the Third Circuit rejected a claim of vindictive prosecution because the defendant had failed to allege that anyone at the charging office bore him any impermissible ill-will and because he had not demonstrated that the decision to prosecute him "was not based on the 'usual determinative factors.'" 879 F.2d at 68. That is the same determination that the court below made here, so *Schoolcraft* also does not support petitioner's claim.

United States v. *Monsoor*, 77 F.3d 1031 (7th Cir. 1996), is similar. In that case, the court stressed that, to make out a vindictive prosecution claim, "[a] defendant must show that the ill will, whoever its bearer, actually motivated his prosecution[,]" and that the referring entity "prevailed upon the prosecutor in making the decision to seek an indictment." *Id.* at 1035. In *Monsoor*, as in this case, the court found that the referring party had not "prevailed upon" the prosecutors who had indicted the defendant; instead, the prosecutors had made an independent determination that such a prosecution was appropriate.

The other two cases cited by petitioner are even farther afield. In *United States* v. *Adams*, 870 F.2d 1140 (6th Cir. 1989), the question was not whether the defendant was entitled to rely on a presumption of vindictiveness, but rather whether he was entitled to

discovery. See *ibid.* *Adams* was decided before this Court's decision in *United States* v. *Armstrong*, 517 U.S. 456 (1996), which provided significant guidance on the circumstances under which a defendant is entitled to discovery in connection with a selective or vindictive prosecution claim. Moreover, in that case the defendant had submitted an affidavit from an employee of the referring agency (the EEOC), which stated that the referral had been motivated by animus, and an affidavit from an employee of the prosecuting agency (the IRS), which stated that the prosecution was highly "unusual," as well as other significant evidence. *Adams*, 870 F.2d at 1145-1146. Even assuming, therefore, that *Adams* remains good law, the circumstances of that case were significantly different from those here.

Finally, petitioner cites *United States* v. *P.H.E., Inc.*, 965 F.2d 848 (10th Cir. 1992) (Pet. 6). *P.H.E., Inc.* was not a vindictive prosecution case. Rather, prosecutors brought multiple simultaneous coordinated prosecutions for violations of federal obscenity laws, and, apparently, sought to inhibit the dissemination of material that was protected by the First Amendment. See 965 F.2d at 850-851. Here, in contrast, there was no misconduct or coordinated prosecutions, and the court of appeals found that the prosecutors in the Eastern District of North Carolina had a valid basis to indict petitioner.[3]

---

[3] Petitioner suggests (Pet. 7-8) that the decision below conflicts with decisions of this Court, which, he implies, establish that courts considering vindictive prosecution claims should aggregate the intents of all government actors. First, as noted above, the court of appeals rejected the view that petitioner had demonstrated any actual animus on the part of the South Carolina pro-

2. Petitioner also argues (Pet. 8-11) that this Court should grant certiorari to "clarify the standard of review applicable to vindictive prosecution claims." Pet. 8. Further review is not warranted because the court of appeals applied the correct standard of review, no ripe conflict exists, and petitioner would not prevail under any standard of review.

The court of appeals applied the correct standard of review. In ruling on claims of vindictive prosecution, district courts make three different types of determinations. First, the court must decide whether the defendant has proved that the decision to prosecute was actually based on an impermissible motivation. Such rulings involve determinations of fact and are

---

secutors. In any event, none of the decisions that petitioner cites establishes the rule that he seeks.

Three of the cited cases did not involve vindictive prosecution claims. The issue in *S & E Contractors, Inc.* v. *United States*, 406 U.S. 1 (1972) (Pet. 7), was "whether the Department of Justice may challenge the finality of a contract dispute decision made by the Atomic Energy Commission (AEC) in favor of its contractor, where the contract provides that the decision of the AEC shall be 'final and conclusive.'" 406 U.S. at 2. In *Berger* v. *United States*, 295 U.S. 78 (1935) (Pet. 7), this Court reversed a criminal conviction because the government's lawyer had engaged in a pattern of serious misconduct at trial. 295 U.S. at 84-86. The question in *Giglio* v. *United States*, 405 U.S. 150 (1972) (Pet. 7), was whether the government violated its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), by failing to inform the defendant that a prosecutor in the same office as the trial prosecutor had promised a key witness that he would not be prosecuted if he cooperated with the government. *Giglio*, 405 U.S. at 150-151. In contrast, *Thigpen* v. *Roberts*, 468 U.S. 27 (1984) (Pet. 8), was a vindictive prosecution case. But the Court stated that it "need not determine the correct rule when two independent prosecutors are involved," because there the referring prosecutor had "participated fully" in the later proceeding. 468 U.S. at 31.

properly reviewed for clear error, as the court below recognized. Pet. App. 23; see Pet. 8 (citing cases). Second, in the absence of such proof, a district court must determine whether the objective circumstances demonstrate "a realistic likelihood of vindictiveness." Pet. App. 17 (quoting *Blackledge* v. *Perry*, 417 U.S. 21, 27 (1974), and citing *United States* v. *Goodwin*, 457 U.S. 368 (1982)). Because that determination involves a consideration of the "legal adequacy of the evidence" in support of such a presumption, the court of appeals properly determined that the correct standard of review is de novo. Pet. App. 19. Finally, assuming that a presumption of vindictiveness is triggered, a district court must determine whether the government has rebutted it. Although the court below had no need to and did not decide the proper standard for reviewing such determinations, *id.* at 29, the determination whether a presumption has been rebutted is basically one of fact and is properly reviewed for clear error. See, *e.g.*, *United States* v. *Perez*, 79 F.3d 79, 81 (7th Cir.), cert. denied, 519 U.S. 856 (1996).

There is no clear conflict on the proper standard of appellate review of a district court's determination that a presumption of vindictiveness has been triggered. The issue in *Perez* (Pet. 10-11) was the appropriate standard of review for determinations that a presumption of vindictiveness, once triggered, "has been rebutted." 79 F.3d at 81. In *United States* v. *Meyer*, 810 F.2d 1242 (D.C. Cir. 1987) (Pet. 9), cert. denied, 485 U.S. 940 (1988), the district court found that the defendant had proven that the government had acted with actual vindictiveness. 810 F.2d at 1245. Consequently, the court of appeals had no need to decide the appropriate standard for reviewing determinations that a presumption of vindictiveness has been triggered. Any-

thing that the court said about such a standard of review was dicta.

The only other case cited by petitioner is *United States* v. *Wood*, 36 F.3d 945 (10th Cir. 1994) (Pet. 9). There, the court of appeals did state that it could not "conclude that the district court's finding that a reasonable likelihood of vindictiveness existed was clearly erroneous." 36 F.2d at 946. In *Wood*, however, the government had not provided "any rational explanation" for why it brought the challenged charge when it did, and had offered no evidence to overcome the presumption of vindictiveness. *Id.* at 947. Because it appears likely that the defendant in *Wood* would have prevailed under any standard of review, any perceived conflict between this case and *Wood* would make a poor basis for granting certiorari.

In addition, the Tenth Circuit's actual practice is unclear in light of *United States* v. *Wall*, 37 F.3d 1443 (1994), which was decided less than a month after *Wood*. In *Wall*, the Tenth Circuit reversed a district court's conclusion that a defendant had demonstrated facts sufficient to trigger a presumption of vindictiveness. See *id.* at 1449. The court of appeals stated that it reviewed "factual findings on prosecutorial vindictiveness for clear error," but also stressed that it reviewed "de novo the legal principles which guide the district court." *Id.* at 1448 (internal quotation marks and citation omitted). And, in determining that the district court had "erred in finding a presumption of vindictiveness," *id.* at 1449, the court of appeals stressed that the district court had misapplied the fairly precise legal principles that determine whether a presumption of vindictiveness is appropriate. *Id.* at 1448-1449. *Wall* thus suggests that the Tenth Circuit, like the court below, actually views the question

whether a presumption of vindictiveness has been triggered as being primarily one of law. In any case, the tension between *Wood* and *Wall* demonstrates that the Tenth Circuit's position is at least unclear, and that fact alone justifies denying certiorari.

Finally, petitioner would not prevail under any standard of review. The court of appeals held that the district court had committed clear error in finding that the prosecution of petitioner was actually vindictive. All of the considerations that the court of appeals applied in reaching that conclusion apply equally to its determination that petitioner had not demonstrated that the circumstances justified a presumption of vindictiveness. Consequently, the district court's decision should be reversed under any standard of review, and thus petitioner would not benefit from a favorable decision of this Court on that issue.

3. Petitioner's last argument in favor of certiorari (Pet. 11-14) is that "[t]he circuits are split on the appropriate standard of review of discovery orders in claims of vindictive or selective prosecution." Pet. 11. Even assuming that such a split exists, this case would not present an occasion to resolve it. The district court granted discovery to petitioner, ordered a hearing on the merits, and ultimately held for petitioner on the merits. The court of appeals reversed on the merits and remanded, specifically stating that it did "not reach the government's challenge to the district court's ruling ordering discovery." Pet. App. 29. As a result, anything that the court of appeals said about the standard of review of discovery orders was dicta, and this case does not, in its current posture, present the question of the appropriate standard of review of such orders.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MICHAEL CHERTOFF
Assistant Attorney General

LOUIS M. FISCHER
Attorney

APRIL 2002